

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLARENCE W. HENDERSON,

APPELLANT

285A

v.

UNITED STATES OF AMERICA,

APPELLEE

Appeal from the United States District Court
for the District of Columbia

No. 21,602

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 1 1968

Nathan J. Carlson
CLERK

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QUESTIONS PRESENTED

1. Whether the District Court Judge abused the discretion vested in him by Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965) to the point of plain error within the meaning of Rule 52 (b) Fed.R.Crim.P., when he permitted the government to impeach the appellant by showing a prior conviction of the same offense as the offense charged.
2. Whether, on the record, a new trial should be ordered on the grounds that the appellant was not represented by effective counsel.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLARENCE W. HENDERSON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

NO. 21,602

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Clarence W. Henderson, the defendant below, was convicted by a jury of Violations of Title 22-1801 and Title 22-2202 of the District of Columbia Code, 1967 Edition, as amended, and upon conviction and sentence, an appeal was allowed without prepayment of costs. This Court has jurisdiction pursuant to the provisions of Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Appellant, Clarence W. Henderson, was indicted on two Counts charging him with housebreaking and grand larceny (Title 22-1801 and Title 22-2201, D.C. Code). Appellant was tried by

jury and convicted of Count One (housebreaking) and the lesser included offense of petit larceny (Title 22-2202) under Count Two. He was sentenced to two to eight years on Count One and one year on Count Two running concurrently.

Before the jury was impaneled, the Court and opposing counsel entered into a colloquy concerning the problem of admitting a prior conviction of appellant as going to credibility under the case of Gordon v. United States, ___ U.S.App.D.C.____, 383 F.2d 936 (1967). The prosecuting attorney recognized that: ". . . we do run into this problem, of course, which is recognized in the Gordon case, that is, he is on trial for the same charge of which he has been convicted." Tr 4. The trial judge, after apparently accepting the prosecution's argument that the house-breaking conviction was an offense involving dishonesty, placed the burden upon defense counsel to distinguish appellant's prior conviction "on the grounds that in the Gordon case, namely, that it was, shall we say, an assaultive housebreaking for the reasons outlined by Mr. Silbert . . ." Tr 5-6.

The government, in its case-in-chief, produced two police officers and the owner of the store as witnesses. The first witness to appear, Private George M. Young of the Metropolitan Police Department, was one of the first officers to arrive at the scene of the grocery store--- located at 1776 U Street, N.W. Officer Young testified that he arrived at the scene about the same time as another patrol car assigned to the 13th Precinct---

about 3:30 A.M. on Saturday June 17, 1967. Young testified that he observed a figure in a tan jacket inside the dark store and that he told the other squad car to drive around to the back of the store. Tr 8. He also notified the radio dispatcher to send more men to the scene.

Help soon arrived and Officer Tinsley arrived at the scene with his K-9 trained police dog. Young observed Tinsley enter the store through the broken front window. Tr 10. He testified that Tinsley entered the store with his dog and that shortly afterwards Tinsley and the dog emerged through the front door with the appellant. After searching the appellant for weapons, Young rode in the back seat of the patrol car with appellant to the 13th Precinct. Tr 11. He returned to the store and asked the owner if anything was missing from the store. He observed the owner make a tally of his money order cash to see if any of it was missing.

Young also testified that he made another search of the appellant at Precinct headquarters and that he took a roll of quarters and twenty-four one dollar bills off the appellant.

On cross-examination, Young testified that he was at the Precinct with appellant for approximately ten minutes before returning to the store. Officer Young admitted that he could not

definitely recall seeing the owner of the store, Mr. Loeb, until he arrived back from Precinct No. 13. Tr 21. Young also admitted that he did not know whether the lock on the front door of the store could be opened from the inside without a key. Nor could he remember whether appellant's wallet contained any money at the time it was taken from him. Tr 24. He also testified that he believed that the cabinet below the cash register had been pried open because of the fresh wood marks on it. Tr 22.

The second government witness, Officer William P. Tinsley of the Metropolitan Police Department, testified on direct examination he arrived on the scene shortly after Young and several other officers. Tinsley cleared away the glass from the area of the sidewalk in front of the broken store window so he could send his dog into the store. Tr 27. He went into the store to clear the glass away so as to avoid having the dog injure its feet. Tinsley claims that he was in the store about five minutes before he ordered his dog to follow him through the window and into the building. Tr 27. Approaching the rear storeroom, he opened the door and let his dog proceed ahead of him while he examined a skylight. He heard a scream and heard his dog growling and barking. Tr 28.

Tinsley claimed that the appellant was inside the storeroom and on top of a pile of cartons with the dog chewing his leg. Tr 28.

Calling off his dog, he took appellant to the front of the store. The manager unlocked the front door and Tinsley turned appellant over to Officer Young and other officers. Tinsley was unable to find any other suspects in the store. On cross-examination he admitted that the back of the store was "pretty dark." Tr 32. In contrast, Officer Young has testified that he had seen a suspect in the store when he first arrived there. Tr 8.

Murray Loeb, co-owner of the store, was the third witness called by the government in its case-in-chief. Loeb testified that he was called by the police about four in the morning and asked to come down to his store. He found his manager and an officer inside the store when he arrived at the scene. Tr 37. Loeb conducted a search for missing property and discovered that the money kept in the money order box (located in a cabinet separate from the register) was missing. Loeb tallied the amount missing and estimated it to be between \$270 and \$300.00. Loeb testified that he did not have insurance to cover the theft. The Court instructed the jury to disregard Loeb's remark that he "couldn't get insurance." Tr 39.

According to Mr. Loeb, not only was the money order cash gone, but the cash register till was empty. Tr 40. Loeb explained to the jury that he always left about \$100.00 in cash in the till overnight for the next day's business. Tr 36. No money was in the register at the time he examined it. Tr 40.

On cross-examination, Loeb reiterated that he normally kept about \$100.00 in the register overnight and that he had left approximately that sum in the register on the previous night. Yet he could not recall whether he had left a roll of quarters in the till the night before. Tr 45.

After Loeb concluded testifying counsel for the appellant moved for and was denied a motion for judgment of acquittal.

Tr 53.

Defense counsel produced only one alibi witness: the appellant in his own behalf. Appellant testified that he was at a party with his cousins and their friends at his aunt's home located just down the block from the grocery store on the night of June 16, 1967. Tr 54. Appellant admitted he had been drinking at the party. He claims that he left his aunt's home about three in the morning and went up the alley which runs between U Street and Willard Street. While walking through the dark alley he was jumped by a police dog. Tr 54. The dog came from his left---down an intersecting alleyway: appellant grappled with the dog and suffered a serious leg wound. Tr 55. He testified that the police took him up to U Street and that he was confronted by a woman who stated that he was the person she had seen coming out of the grocery store. Tr 55. Appellant had \$34.10 in cash on him at the time he was arrested by the police.

On cross-examination, appellant told the jury that he had arrived at his aunt's house about 10:00 P.M. on Friday night. Tr 57. He had been with his father, a younger brother, and his sister before going to his aunt's home. Tr 58. Appellant admits that he had been drinking before arriving at the party. Tr 59. Appellant stated that there were twelve people at the party--- his cousins and their friends. Tr 61-62.

Appellant left his aunt's home about three in the morning on June 17th: everyone that was present when he first arrived was still at the party when he left. He turned up the alley and headed towards U Street. He talked with his cousin who was sitting on the front stairs. Tr 66. None of appellant's relatives nor friends present at the party nor the alleged witness at the scene were called to testify.

Appellant further stated that he was midway up the alley when set upon by the police dog; that he had not heard anyone call to him while walking up the alley. Tr 68; that he was rather intoxicated inasmuch as he had been drinking for several hours; that Officer Tinsley told him he had allowed his dog to attack him because appellant had failed to stop after being hailed; that the police took him to U Street and search him; and that he was taken to the Precinct headquarters in a squad car. Tr 73. Appellant denied that Officer Young rode in the squad car with him to the Precinct. Tr 73. Appellant testified that the police took his personal items and his money away

from him at headquarters; that he had tens, fives, and one dollar bills on him amounting to \$34.00 plus ten cents. Tr 74. Upon conclusion of the cross-examination of appellant the prosecuting attorney was permitted to ask appellant if he were the one and the same Clarence W. Henderson who had been convicted of housebreaking five years before-- in 1962.

In the afternoon session, the defense renewed its motion for judgment of acquittal and the Court elected to entertain said motion after hearing the government's three rebuttal witnesses. Tr 79.

The first witness to be called on Rebuttal direct examination was Lieutenant Jack E. Lockhart of the Metorpolitan Police Department. Lockhart's testimony was in direct conflict with Officer Tinsley's testimony: Lockhart stated that he observed Tinsley order his dog into the building before him whereas Tinsley stated that he had entered the store before ordering the dog to follow him. Tr 82. On Rebuttal cross-examination, Lockhart testified that he had taken appellant back to headquarters in his own cruiser. Tr 89. He persisted that Tinsley went into the store behind his dog--- in direct conflict with Tinsley's testimony. Tr 87. Tinsley, on rebuttal cross-examination again testified that he had gone into the store before ordering his dog to follow him into the building. Tr 101.

At the end of rebuttal, defense counsel renewed his motion for a judgment of acquittal. Tr 104. The Court reserved its ruling. In its closing argument, the prosecution recounted the police stories and asked the jury for a verdict of guilty on both Counts. In summation for the defense, counsel stated in reference to the prosecution's argument that:

". . . . the assistant United States attorney has delineated the facts and the evidence quite lucidly and clearly. He has demonstrated and brought to your attention just what happened in this case." Tr 117-118. Referring to the appellant as a "housebreaker and a thief", the prosecuting attorney in his rebuttal argument again asked for conviction. Tr 124.

The Court, in its instructions to the jury, gave an instruction on the lesser included offense of petit larceny and a limiting instruction on the use of appellant's prior conviction for housebreaking. Tr 135.

The jury, after deliberation, returned a verdict of guilty as charged under Count One and guilty of the lesser included offense of petit larceny under Count Two. Tr 146.

STATUTES INVOLVED

Title 22-1801.

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22-2201.

Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 22-2202.

Whoever shall feloniously take and carry away any property of value of less than \$100, including things savoring of the realty, shall be fined not more than \$200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

STATEMENT OF POINTS

1. The trial court erred in permitting the prosecution to impeach appellant by the use of a prior conviction of the identical offense for which appellant stood trial.

2. The record would appear to indicate that appellant did not receive effective assistance of counsel.

SUMMARY OF ARGUMENT

1. It is contended by appellant that the use of a prior housebreaking conviction to impeach appellant in a trial for a subsequent housebreaking indictment is an abuse of discretion on the part of the Trial Court and plain error where the Court has failed to ascertain whether the prior conviction related directly to veracity and whether there were strong reasons for disclosure of the conviction as against the admitted strong reasons for exclusion as contemplated in Gordon v. United States, ___ U.S.App.D.C. ___, 383 F.2d 936 (1967).

2. It is contended by appellant that, on the record, it appears that he failed to receive effective assistance of counsel where defense counsel failed to call as witnesses individuals who were in a position to bolster appellant's alibi testimony; where defense counsel failed to object to the admission of highly prejudicial evidence of appellant's prior conviction for the same offense as charged; where defense counsel

failed to object to inflammatory and irrelevant statements made by the prosecution during its closing and rebuttal arguments; and, where defense counsel, in his closing argument before the jury made statements tantamount to an admission of guilt on the part of the appellant.

ARGUMENT

POINT ONE

Since Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965), the law has been clear that prior convictions of witnesses are admissible only for purposes of impeachment in a criminal case. A recent case, Gordon v. United States, supra, has attempted to spin out the ramifications of the Luck opinion and the subsequent decisions in this area. Gordon recognizes the value of admitting prior convictions for impeachment purposes and the danger involved in carelessly allowing an influx of such prejudicial evidence before the jury:

"The rationale of our Luck opinion is important; it recognized that a showing of prior convictions can have genuine probative value on the issue of credibility, but that because of the potential for prejudice, the receiving of such convictions as impeachment was discretionary." Gordon v. United States, ___ U.S.App.D.C. at ___, 383 F.2d at 939 (1967).

We are told in Gordon that a flexible "rule of thumb" for the court in exercising its discretion is that:

"Convictions which rest on dishonest conduct relate to credibility whereas those of violent

or assaultive crimes generally do not." Gordon v. United States, ___ U.S.App.D.C. at ___, 383 F.2d at 940 (1967).

Such a consideration is not enough when--as in this case--the prior conviction sought to be admitted is for the same or substantially the same conduct for which the accused is on trial. Gordon suggests that where there are multiple convictions of various kinds,

". . . strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on the jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity." Gordon v. United States, ___ U.S. App.D.C. at ___, 383 F.2d at 940 (1967).

It is against this background that the question is presented as to whether the trial judge abused his exercise of discretion in allowing the appellant's prior conviction for housebreaking to be admitted into evidence on cross-examination. Tr 75.

The bench conference at the beginning of the trial (Tr 3-6) contains the seeds of error which resulted in the admission of the appellant's prior conviction for housebreaking. The court was aware of the problems posed by Luck and Gordon

and exercised its discretion in reaching a determination that the use of one prior conviction would be admissible for impeachment purposes. The trial judge noted that such evidence should be "sparingly used" (Tr 4) and then apparently accepted the prosecutor's view that the housebreaking offense involved dishonesty such as to be relevant to the credibility issue involved. At the bench conference the court, in talking to the attorneys, said:

"We will leave it this way. If Mr. Foshee, prior to the time the defendant wishes to take the stand, can differentiate the most recent house-breaking conviction on the grounds that in the Gordon case, namely, that it was, shall we say, an assaultive housebreaking for the reasons outlined by Mr. Silbert, I will hear you. Otherwise I will permit you [Silbert] to ask questions." Tr 5-6.

It is submitted that the court abused its discretion in placing the burden upon the defense counsel to differentiate the Gordon case on the grounds initially suggested by the prosecution while at the same time failing to ascertain that (1) the conviction related to veracity; and (2) that the "circumstances indicate strong reasons for disclosure . . ."

Gordon v. United States, ___ U.S.App.D.C. at ___, 383 F.2d at 940 (1967).

Such a failure on the part of the trial judge constitutes plain error when seen in the context of this case. The appellant was the only witness for the defense and he was juxtaposed

against four witnesses for the prosecution--three of them police officers. The guilt or innocence of the appellant turned upon the issue of credibility. Echoing Gordon it is in just such a volatile situation that the trial judge must carry the heavy and difficult burden of assessing the admissibility of prior convictions for impeachment purposes: and it was in this situation that the court failed to do so. Where everything pivots on credibility, the court must be even more careful to weigh and assess the probative value of the prior convictions as to credibility against their great prejudicial impact. The court failed to heed even the rough "rule of thumb" laid down in Gordon and make an on the record determination of whether the 1962 housebreaking conviction related directly to veracity. The trial judge placed the burden on defense counsel to differentiate the prior conviction under Gordon criteria. It is no answer to say that the defense failed to so distinguish Gordon as desired by the court.

Gordon contemplates that in such a situation the burden should be placed on the prosecution. The responsibility of the trial judge is heavier:

"... one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity." Gordon v. United States, U.S.App.D.C. at 383 F.2d at 940.
[Underscoring supplied]

The court allowed the conviction to be used as evidence without having ascertained whether there were (1) strong reasons for disclosure or (2) whether the conviction directly related to veracity. In the volatile situation--where the jury was faced with a single looming issue--of credibility, this failure on the part of the court was plain error.

POINT TWO

Assuming that the argument proffered above is rejected and that the burden of proving that the prejudicial impact of the prior conviction evidence was not outweighed by its probative value rests with the party seeking to exclude such evidence, this is tantamount to an admission that defense counsel was ineffective. This ineffectiveness exhibited itself when defense counsel made no effort at all to invoke the Gordon criteria for determining admissability; again when defense counsel abandoned his role as advocate by offering no rebuttal to the prosecution's interpretation of the law in this area; and again when defense counsel made neither argument nor objection to the ultimate ruling of the trial court on the prior conviction evidence.

Further, defense counsel was ineffective in failing to object to several statements made by prosecution in summation which were outside the proper scope of such summation, irrelevant, and tending to inflame the minds of the jury. First, defense

counsel failed to object to the remarks of prosecution calling the appellant ". . . a housebreaker and a thief, as shown by the evidence." Tr 124. Lack of objection by defense counsel to such an unqualified statement allowed the jury to infer from the evidence of appellant's prior housebreaking conviction that appellant was an inveterate housebreaker and thief when, in fact, that evidence was admitted solely for the limited purpose of attacking appellant's credibility. Tr 135. Inferences of this sort fall into a danger area of prejudice which the Luck and Gordon cases, supra, have sought to control. Secondly, defense counsel failed to object to the remarks of prosecution which inferentially told each jury member that a failure to believe the story offered by the police would be equivalent to an attack on the "officers of our police force." Tr 124-125. The Supreme Court of the United States has held that an individual's right to a fair trial was unduly prejudiced when the prosecution,

"In his closing remarks to the jury . . . indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." Viereck v. United States, 318 U.S. at 247, 63 S.Ct. 561, 97 L.ed. at 741 (1945).

In Viereck the prosecution had argued that, with a war raging, each person on the jury must do his part for the war effort and America by finding the defendant guilty. This is the same type

of argument made in the case at bar and consequently should fall under the same proscription. The prosecution argued that it was the duty of each person on the jury to reaffirm their faith in the police department by finding the appellant guilty. Such inferences fly in the face of Viereck, especially since the present case turns entirely upon credibility.

Defense counsel also failed to produce certain individuals who could provide appellant with an alibi at the time of the alleged crime. Appellant testified that, on the night in question, June 17, 1967, he had entered his aunt's home at 1747 Willard Street, Northwest at approximately 10:30 P.M. (Friday June 16th) where he proceeded to party with friends and relatives. Tr 62. Under direct and cross-examination appellant testified that several people saw him and talked with him at his aunt's home, including his aunt, Mrs. Grady (Tr 52-53, 62-63), his cousin Joeseph Grady (Tr 61-62, 76), and a young man identified as "Butch" (Tr 63, 66, 76). Appellant testified that he did not leave the party until some time after three in the morning on June 17th; that he conversed with people in the house before leaving (Tr 70); and that when he left "everyone" was still at the party (Tr 64). Appellant stated that as he left the house "Butch" and one of his friends were sitting on the front steps of his aunt's home (Tr 66).

The prosecution's witnesses never established through their testimony at what exact time they apprehended appellant. Through-

out the trial references were made by the prosecutor to a time of "about 3:30" (Tr 7, 26, 80, 96). Yet no attempt was made by either counsel to establish concretely the time appellant was actually apprehended. Consequently, it is not unreasonable to assume that appellant's time of "after 3:00 A.M." when he left his aunt's home is consonant with the time of "about 3:30" set by the prosecution as to when appellant was apprehended---especially when one considers the time expended in walking through the alley.

If appellant did leave his aunt's home after three in the morning, it would be inconceivable to assume that he could have walked the distance from the house to the store, broken a window and climbed inside (Tr 10, 37), groped for the checkout counter, broken into one cash register, taken money, somehow disposed of the money, jimmied the lock on an entirely separate cabinet and searched within the cabinet for a box containing money orders and cash, taken the money in that box, somehow disposed of that cash, went to the rear of the store, searched for an exit, cracked open a heavy wooden door (Tr 40, 117), and be apprehended on top of a pile of storage boxes---all within less than thirty minutes. The prosecution, in summation, mentions the difficulty and by implication the time factor necessary for one to gain entrance to the store. Tr 117.

Consequently, what is missing (and could possibly be supplied)

from appellant's defense is testimony which would support his absence from the scene of the crime at the time the crime allegedly took place. It would appear from the record that no attempt was made to utilize the very people who could provide such testimony (Tr 53-54, 61-64, 66, 76). Defense counsel clearly had knowledge of these individuals prior to trial because the entire defense revolved around them and appellant's whereabouts at the time of the crime--- yet none of them were produced at trial. Defense counsel admitted to the court that he had not even "made any efforts to reach the aunt," and that he had "not contacted the aunt." Tr 148. It appears that no effort was made to contact any of the other persons mentioned by appellant in his testimony. These individuals could have been sought and their testimony would have materially altered the course of the trial--- with the result that appellant might have been acquitted or found not guilty.

This Court has decided that if ". . . the failure to call alibi witnesses at the time of trial was attributable to appellant's original trial counsel, who had been aware of these alibi witnesses but had consciously failed to call them," and if this failure was shown not to be a valid tactical decision of defense counsel, then a new trial is warranted. See Campbell v. United States, ___ U.S.App.D.C. ___, 377 F.2d 135 (1966). This is precisely the situation in the case at bar. It would appear that counsel knew of such witnesses at the time of trial and made no attempt to contact them and therefore it could not

be said that counsel failed to produce them because of tactical considerations.

The Campbell principle was reiterated in Jackson v. United States, ___ U.S.App.D.C. ___, 371 F. 2d 960 (1960) (also involving the nonproduction of alibi witnesses) and again in Dyer v. United States, ___ U.S.App.D.C. ___, 379 F.2d 89 (1967). On the record and the cases discussed it would appear that defense counsel rendered ineffective assistance by not attempting to produce crucial alibi witnesses.

Finally, counsel for defense failed to fulfill the role of an advocate for appellant in his closing argument to the jury.

Counsel stated:

"... ladies and gentlemen of the jury, the assistant United States attorney has delineated the facts and the evidence quite lucidly and clearly. He has demonstrated and brought to your attention just what happened in this case." Tr 117-118.

It is submitted that such a remark, immediately following the vigorous argument of the prosecution, amounted to an admission by counsel of appellant's guilt and represents a failure on the part of counsel to fulfill the function of an advocate for appellant before the jury. The prosecution had put forward a forceful argument in which he told the jury that the appellant was not to be believed; that the appellant had been caught inside the store; and that the evidence of appellant's guilt was "overwhelming." Tr 105-117. Such a remark as that made by

defense counsel, in the heat of closing argument and in a situation where credibility was the sole issue, was tantamount to an admission by counsel of appellant's guilt and a corresponding failure of advocacy.

All the aforementioned points of this argument indicate that appellant received ineffective assistance of counsel.

In Dyer, supra, the court said that

"... the majority is satisfied . . . [that] . . . the defense fell substantially short of what we should consider adequate. Cumulatively, various facets becomes so meaningful that we are of the opinion a new trial is fairly required . . ."

Dyer v. United States, ___ U.S.App.D.C. at ___, 379 F.2d at 89 (1967). [Underscoring supplied]

Appellant contends that the aforementioned "facets" in the case at bar present a situation in which the defense fell short of what is adequate. Yet even if the facts on the record do not clearly establish that appellant has been deprived of effective assistance of counsel, there is sufficient evidence of deficiencies on the record that a new trial should be ordered on the reasoning of Suggs v. United States, ___ U.S. App.D.C., ___ F.2d ___, (#20,463) (1968). In Suggs this Court addressed itself to a situation where appointed counsel for appellant sought to withdraw from the case. Nevertheless, the principle of the case is applicable to the case at bar. The principle stated is that the Court may reverse a lower court

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holding if it appears on the record that defendant received inadequate representation, although the inadequacy may not be sufficient to establish ineffective assistance of counsel.

CONCLUSION

Considering the aforementioned arguments the appellant requests that the judgment of the Trial Court be reversed and the proceedings remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief
for Appellant was mailed, postage prepaid, to the United States
Attorney on this first day of April, 1968.

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UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

CLARENCE W. HENDERSON V. UNITED STATES No. 21,602

Listed below are the relevant portions of trial transcript which Appellant desires to have reproduced in conjunction with the Brief for Appellant:

pages 3 through 6 inclusive.

pages 57 through 66 inclusive.

page 75.

pages 105 through 118 inclusive.

pages 123 through 127 inclusive.

pages 132 through 133 inclusive.

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page 146.

page 148.

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BRIEF FOR APPELLEE

285

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,602

CLARENCE W. HENDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
1969
Office of the United States Attorney.

FRANK Q. NEBEKER,
EARL J. SILBERT,
John Paulson
JULIUS A. JOHNSON,
Office of the United States Attorney.

Cr. No. 941-67

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

- 1) Whether the trial court erred in permitting the Government to impeach appellant with one of several possible convictions where the court *sua sponte* exercised its discretion under *Luck* and considered relevant criteria?
- 2) Whether the heavy burden of a claim of ineffective assistance of counsel sustained on this record?

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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 21,602

CLARENCE W. HENDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for housebreaking (22 D.C. Code § 1801) and grand larceny (22 D.C. Code § 2201). Trial on November 8, 1967 before District Court Judge Oliver Gasch and a jury resulted in convictions for house-breaking and petit larceny (22 D.C. Code § 2202) (Tr. 146). On December 15, 1967, appellant was sentenced to a term of two to eight years for housebreaking and one year for petit larceny, to run concurrently.

At the time of trial the court held a bench conference prior to the selection of a jury. The court learned that appellant had two housebreaking convictions in 1958 and

1962 and an unlawful entry conviction. The court ruled that it would permit impeachment of appellant with one housebreaking conviction (Tr. 3-5).

The relevant evidence showed that at approximately 3:30 a.m. on Saturday, June 17, 1967 Metropolitan police officers went to the 1700 block of You Street, N.W. in the District of Columbia in response to a report of house-breaking in that area. Upon observing someone inside a grocery market at 1776 You Street, N.W., Private George M. Young stationed himself in the front of the premises while other officers went to the rear. Additional help was summoned (Tr. 8). A burglar alarm began to ring. A Canine Corp officer, William P. Tinsley, and his dog arrived on the scene, went into the market through a space in the front where a glass panel had been broken out, and moments later came out with the appellant in custody (Tr. 10). Appellant was searched for weapons on the scene (Tr. 11) and then taken to a precinct stationhouse where a thorough search uncovered a roll of quarters and twenty-four one dollar bills (Tr. 13) which were admitted in evidence (Tr. 52).

A co-owner of the market, Murray Loeb, left it around 9:30 Friday evening, June 16, 1967 (Tr. 35). It was customary for him to leave about one hundred dollars in the cash register for the next day's business. This money would vary as to the number of one and five dollar bills depending on the quantity already in the cash register. It would be approximately thirty-five to fifty dollars in ones and twenty-five dollars in fives. Rolls of nickels, dimes, or quarters would be added according to the need (Tr. 36). He went to the store around 4:00 a.m. Saturday after receiving a call from the police. He discovered that this money had been removed and approximately \$250 or more, representing receipts from the sale of money orders, was missing from a box (Tr. 38, 40, 47). Inspection of the store also revealed it in considerable disarray. Upon cleaning the storage room, Loeb found five tightly crumpled five dollar bills (Tr. 41). The back door to the market which triggers the burglar alarm had been

opened, but the steel door directly behind it, which could not be opened except with a key, was still locked. (Tr. 40).

Appellant testified and his story basically was that he was an innocent victim of circumstances. On Friday evening, June 16, 1967 and the early part of the following morning, he was at a party at his aunt's house, 1747 Willard Street, N.W. Present were his aunt, Mrs. Grady, his cousin, Joseph Grady, and several of his cousin's friends, of whom appellant knew only "Butch". (Tr. 54, 62-63). A little after 3:00 a.m. he left the party, alone and slightly intoxicated. (Tr. 54-55). In walking toward You Street to catch a cab, he went through an alley two houses from his aunt's place (Tr. 65, 66) when he was attacked by a dog that "tried to get me at the throat" (Tr. 55, 68). A policeman later called the dog off (Tr. 55). He was searched on the street in front of a store with an activated burglar alarm (Tr. 77). He had thirty-four dollars and ten cents on him, "two tens, two fives and four one-dollar bills" (Tr. 54-55, 74).

Appellant stated that the store was around the corner from his aunt's place and that he was not in it on June 17, 1967, nor had he been since 1962 (Tr. 56). Without objection, appellant's credibility was impeached by evidence of one prior housebreaking conviction (Tr. 75).

In rebuttal, Lieutenant Jack E. Lockhart, Metropolitan Police Department, testified to being on the scene of the housebreaking with other officers, and witnessing the apprehension of appellant by Officer Tinsley and his dog inside the store. (Tr. 81-83). Officer Young was recalled and stated that on the morning of appellant's arrest he perceived no signs indicating appellant had been drinking alcohol (Tr. 93). Officer Tinsley, after recall, testified that at the time and place in question he did not command his dog to chase any one and that the dog was trained to apprehend persons by the arm, not throat (Tr. 98-99).

In summation, no reference was made by either counsel to appellant's prior conviction. The trial court's instructions which included the limited use to which appellant's

prior conviction could be put (Tr. 135-136), were satisfactory to defense counsel (Tr. 145). The jury decided in forty-five minutes that the Government's evidence proved appellant guilty beyond a reasonable doubt of housebreaking and petit larceny, as a lesser included offense of grand larceny (Tr. 146).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2201, provides:

Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 22, District of Columbia Code, Section 2202, provides:

Whoever shall feloniously take and carry away any property of value of less than \$100, including things savoring of the realty, shall be fined not more than \$200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound dis-

cretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

SUMMARY OF ARGUMENT

I

There was not an abuse of discretion where the trial court conducted a hearing *sua sponte* under *Luck v. United States* and ruled to permit impeachment of appellant with a prior housebreaking conviction. Appellant made no objection at any time and cannot complain on this appeal. In any event, the record amply demonstrates that the court in ruling as it did brought to bear relevant cases and criteria. Primary considerations were whether the prior offense was recent, relevant to credibility, and deterrent to appellant's testifying. Since appellant was on trial for housebreaking the court felt appellant's prior housebreaking convictions "should be sparingly used." Appellant was unable to bring to the court's attention, upon invitation, circumstances of the prior offense that could be considered as a factor justifying exclusion of the offense. Moreover, the prosecutor, in summation did not make reference to the conviction. The court instructed the jury that the prior conviction could be considered only in evaluating credibility. In view of this, we submit, the court did not abuse its discretion.

II

Appellant cannot sustain on this record his heavy burden of establishing that the representation of trial counsel deprived him of a fair trial. The record does not support his principal claims that ineffective assistance of counsel was rendered in the failure to call witnesses who could not support his "alibi" defense and to object to remarks of the prosecutor which were based on the evidence. Other alleged deficiencies in the advocacy of trial counsel are equally groundless and non-prejudicial. Any conceivable adverse effect was dissipated by the trial court's instructions.

ARGUMENT

- I. It was not plain error where the trial court *sua sponte* conducted a hearing in which it considered, *inter alia*, appellant's prior convictions and ruled under appropriate criteria that appellant could be impeached with one conviction should he testify.

(Tr. 3-6, 135-36)

Before a jury was selected, the trial court called counsel to the bench, and after a brief discussion, the following ensued:

THE COURT: All right. Do we have a Luck, Brook, Brown problem insofar as the defendant is concerned? Does he wish to take the stand?¹

[DEFENSE COUNSEL]: Yes, he does, Your Honor.

THE COURT: Does he have any record?

[PROSECUTOR]: Yes, two prior housebreaking convictions and an unlawful entry. The housebreakings are 1958 and 1962. The unlawful entry is prior to that. I am not sure of the exact year. So we do run into this problem, of course, which is recognized in the Gordon case, that is, he is on trial for the same charge of which he has been convicted.

THE COURT: I think perhaps I should limit you to one housebreaking.

[PROSECUTOR]: That would be reasonable. I wouldn't ask for any more.

THE COURT: What is the most recent one?

[PROSECUTOR]: 1962 for which he received a sentence of four years, I believe.

THE COURT: As I read Judge Robinson's opinion in Brook, it is perfectly proper to bring in a con-

¹ A hearing under *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), such as here, may commend itself in an important respect: it would enable defense counsel to determine during *voir dire* of prospective jurors whether their knowledge of the past conviction(s) which the court has ruled permissible impeachment material, would necessarily cause them to pre-judge the defendant.

viction for some other offense. It was narcotics in that case.

[PROSECUTOR]: May I say this. That is true and also in Marcus Gordon, Judge Burger addresses himself to that problem and suggests that it would probably be preferable for the presiding judge to limit the cross-examination to one such offense if there are more of such offenses in the man's background.

THE COURT: It should be sparingly used.

[PROSECUTOR]: Yes.

THE COURT: What is your position about whether housebreaking is an offense involving dishonesty such as larceny would be or perjury?

[PROSECUTOR]: I would say that it is. House-breaking with intent to commit a crime therein. I would suggest that housebreaking falls within the same type of category as larceny or robbery. It is not a crime of sudden passion unless he would come forward and say that his convictions on those house-breakings, say, where he was trying to get at his wife to assault her.

But those convictions arise out of housebreaking and larceny cases as opposed to housebreaking, say, with an intent to get at his wife, a crime of sudden passion or outburst.

Therefore, I say when a person deliberately breaks into something with a specific intent to commit a crime, it begins to fall into that area.

THE COURT: We will leave it this way. If Mr. Foshee, prior to the time the defendant wishes to take the stand, can differentiate the most recent house-breaking conviction on the grounds that in the Gordon case, namely, that it was, shall we say, an assaultive housebreaking for the reasons outlined by Mr. Silbert, I will hear you. Otherwise, I will permit you to ask the questions.

[PROSECUTOR]: Yes. Thank you, Your Honor. (Tr. 3-6)

Appellant's contention that the trial judge abused his discretion vested in him by *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), in permitting

impeachment with a prior conviction is exceptionally inappropriate on this record. Here the alert trial judge, before the jury was selected and before any request was made to engage its discretion, broached the subject of possible impeachment with prior convictions. After discussion with counsel of relevant cases and standards, the trial court ruled it would permit impeachment should appellant testify with the most recent of three possible convictions. Appellant made no objection and cannot, after an unfavorable verdict, complain on appeal that this ruling was error. See *Hood and Jackson v. United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966). See also *Trimble v. United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966).

In any event, after Judge Gasch *sua sponte* addressed his discretion to consideration of appellant's prior convictions, his on-the-record determination shows he applied relevant criteria. In *Gordon v. United States*, — U.S. App. D.C. —, 383 F.2d 936 (1967), this Court suggested certain considerations to assist the trial court in properly exercising its discretion. Those considerations included: (1) whether the conviction is recent; (2) whether the prior conviction involved dishonest conduct as opposed to conduct of an assaultive or violent nature; (3) whether use of the prior conviction will preclude the defendant from taking the stand; and (4) whether the conviction is for the same or similar crime, in which case if it is relevant and circumstances indicate strong reasons for disclosure, it should be used sparingly.

Here, the trial court made all of these considerations. Judge Gasch determined that appellant had 1958 and 1962 housebreaking convictions and an unlawful entry conviction. He tentatively permitted use of the most recent housebreaking conviction for impeachment purposes. After inquiry, Judge Gasch adopted the view that house-breaking was relevant to credibility, unless appellant could show that the circumstances of his offense evinced an overriding and sudden impulse to commit an assault

on the person of another.² Appellant was given an opportunity to make such a showing at any time prior to his testifying. By his failure to do so, it was proper to assume that no such factor existed in the previous house-breaking conviction.³

It is apparent that the trial judge was concerned with the possible effect its tentative ruling would have on appellant taking the stand. That appellant wished to testify had been ascertained. While Judge Gasch had not heard any evidence at this point, it was represented by the prosecutor that the appellant had been caught inside the premises with money from them still in his possession. With this limited background, the alert trial judge could perceive, and did correctly, that the case would turn on credibility, thus heightening the importance of appellant's testimony. The court in restricting impeachment to one conviction did not deter appellant, as the only witness in his behalf, from testifying. His version, casting him as an innocent victim of circumstances who was not even inside the premises, was presented fully to the jury.

The decision to limit impeachment to one conviction was also influenced by the fact that possible prejudice might arise in introducing crimes which were the same as the one for which appellant was on trial. Judge Gasch felt, in

² Appellant does not allege that the crime of housebreaking has no relation to credibility, but merely that the trial judge failed to consider whether it did or not (Appellant's Brief, p. 15), which is clearly contradicted by the record (Tr. 5-6).

³ Appellant makes the additional argument that the trial court abused its discretion by placing the burden on trial counsel to ascertain the nature of the prior housebreaking offense. *Luck* contemplates appellant presenting to the trial court sufficient reasons for withholding impeachment with past convictions. Even where the accused invokes *Luck* in the trial court, but initiates no meaningful discourse so as to engage the trial judge's discretion, this Court has considered itself without warrant to set aside the trial judge's determination. *Hood & Jackson v. United States, supra.*

We note also that appellant failed to take advantage of the rule of *Boyer v. United States*, 80 U.S. App. D.C. 202, 150 F.2d 595 (1945), permitting him to explain on the witness stand the circumstances of his prior conviction, regardless of its nature or relation to credibility.

apparent contemplation of *Gordon*, that such convictions, in the instant case two housebreaking offenses, "should be sparingly used" (Tr. 5).⁴

Furthermore, appellant did not object at any time to the use of the housebreaking conviction for impeachment and the prosecutor made no reference to it during summation. Nor was there any objection to the court's full and careful instruction to the jury that evidence of the prior conviction was to be used only in evaluating credibility.⁵ Giving to Judge Gasch's exercise of discretion "a respect appropriately reflective of the inescapable remoteness of appellate review,"⁶ his decision to permit impeachment with the housebreaking conviction should be affirmed.

II. Appellant was not denied effective assistance of counsel.

(Tr. 3-5, 13, 26, 35-36, 54, 55, 77, 117, 118, 119, 120-122, 123, 124)

Appellant makes the final argument that he was denied the effective assistance of counsel. This questionable assertion includes alleged errors of trial counsel in failing to

⁴ Although *Brooke v. United States*, — U.S. App. D.C. —, 385 F.2d 279 (1967), where this Court upheld a decision to permit impeachment with six prior narcotics convictions of appellant on trial for a narcotics offense, was pre-*Gordon*, it might be profitably compared with the instant case.

⁵ This portion of the charge reads as follows:

You will recall, also, respecting the defendant's testimony, that he was asked whether he had not on some prior occasion been convicted of a certain criminal offense. The Court wishes to give you this instruction as to the evaluation of that particular fact which the defendant admitted.

A defendant's prior criminal conviction is admitted into evidence solely for your consideration in evaluating the credibility of the defendant as a witness. It is not evidence of the defendant's guilt of the offense with which he is charged in this case.

You must not draw any inference of guilt against the defendant from his prior conviction. You may consider it only in connection with your evaluation of the credence to be given his present testimony in court. (Tr. 135-136).

⁶ *Luck v. United States*, *supra* at 157, 348 F.2d at 769.

call alibi witnesses and to object to statements of the prosecutor during final argument to the jury.

The claim of ineffective assistance of counsel appears to be appellant's only resting place after a long and arduous search for error on a record replete with overwhelming evidence of guilt. The seeming weight that appellant puts upon this claim still falls far short of his heavy burden to show trial counsel's representation was so ineffective that he was denied a fair trial. See *Harried v. United States*, D.C. Cir. No. 20,327, decided November 30, 1967; *Bruce v. United States*, ____ U.S. App. D.C. ___, 379 F.2d 113 (1967); *Mitchell v. United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, cert. denied, 358 U.S. 850 (1958).

In assessing this claim this Court must look to the entire record and the relative strength of the Government's case. *Mitchell v. United States, supra*. Here three Government witnesses, police officers, testified to appellant being caught inside a market at 1776 You Street, N.W. in the early morning hours of June 17, 1967. After arrest appellant was found to possess twenty-four one dollar bills and a roll of quarters (Tr. 18). The store owner testified that he usually left a large number of one dollar bills and several rolls of coins in the cash register so that approximately one hundred dollars would be available for the start of business the next day (Tr. 35-36). Defense counsel was obviously confronted with a strong case presented by the Government.⁷ Appellant's incredible testi-

⁷ No support to the claim of ineffective assistance of counsel can be found, as appellant argues, in the mere failure to object to use of the prior housebreaking conviction for impeachment. In view of the detailed considerations and informed ruling the trial court made (Tr. 3-5), such an objection was not likely to result in exclusion of the conviction any way. More importantly, there can be no claim of prejudice. See *Covington v. United States*, 125 U.S. App. D.C. 224, 370 F.2d 246 (1966), where on the same facts (appellant was seen inside a shoe store and with property from the premises on him at the time of arrest) and charge as here, the appellant was impeached with several prior convictions, one being housebreaking. This Court affirmed the conviction finding no invocation of the trial judge's discretion under *Luck*, but stated "we are satisfied that the Government's evidence had established so strong a case that it is unlikely the appellant could have suffered prejudice in any event."

mony that he was attacked by a dog while walking alone through an alley and then arrested by police officers for no apparent reason must have only bolstered the Government's case, among other things.⁸

With this record, there could hardly be a failure to call "alibi" witnesses who could only state at most that appellant left a party a little after 3:00 that morning, which is what appellant testified to (Tr. 54). It was approximately 3:30 a.m. that appellant was found hiding in the store by a police officer and his dog (Tr. 26). What "alibi" witnesses would testify to when appellant admits being on the scene of the crime,⁹ could only be irrelevant, if not perjurious, in this context.

To claim that trial counsel was ineffective in not objecting to the prosecutor's argument from the evidence is frivolous. Certainly such trial decisions, even if errors of judgment, cannot be questioned for this purpose. See *Bruce v. United States, supra*; *Mitchell v. United States, supra*. However, the prosecutor's argument did not warrant objection. Specifically, the prosecutor's statement was: "[t]his man, a housebreaker and a thief, as shown by the evidence, does not deserve your sympathy" (Tr. 124). (Emphasis added). That this was not an "unqualified statement" as appellant alleges¹⁰ is patent on its

⁸ Appellant made an extraordinary statement during direct examination:

Q Did there come a time that you were placed in the squad car?

A After I was taken around on U Street. There was a woman there with the police officer. She stated that I was the one she saw coming out of the store (Tr. 55). (Emphasis added).

The prosecutor did not at any time make reference to such an occurrence.

⁹ Note, for example, appellant's testimony that he heard the burglar alarm while on You Street, and that it was ringing when he was outside the front of the store or in the alley (Tr. 77). See also footnote 8.

¹⁰ Appellant's brief, p. 17.

face. Moreover, appellant grossly misconstrues this statement as a reference to the fact of impeachment with the housebreaking conviction, when clearly the reference was to what ample evidence in the instant case showed, and as such, was proper. See *Pritchett v. United States*, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), cert. denied, 341 U.S. 905 (1951).

Furthermore, there is no showing, nor could there be, that this isolated remark by the prosecutor raised even the possibility of prejudice, much less the "substantial prejudice" that appellant must demonstrate. See *Cross v. United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1966). Here appellant's testimony lacked inherent credibility. It cannot be assumed that the jury's disbelief of appellant was in any way a product of a minuscule portion of the prosecutor's, or defense counsel's,¹¹ closing

¹¹ Appellant also alleges that his trial counsel "failed to fulfill his role as advocate" in making this statement which began his summation:

. . . Ladies and gentlemen of the jury, the assistant United States attorney has delineated the facts and the evidence quite lucidly and clearly. He has demonstrated and brought to your attention just what happened in this case (Tr. 117).

For appellant to seize upon this one general statement as a concession of appellant's entire case, is to ignore not only the strong advocacy of counsel under crushing evidence throughout the trial, but to ignore the balance of trial counsel's lengthy summation, particularly the immediately proceeding statement:

However, let me say this. The one point that he [the prosecutor] brought to your attention was that you are the sole deciders of the facts. No matter what he says or what I say, when all the fuss and fury subsides, you are the ones to go in that jury room and, from the evidence as you heard it, from the way the witnesses testified, the demeanor, you are the ones to decide who is telling the truth and who is telling the untruth. (Tr. 118).

For further examples of defense advocacy in closing argument, see Tr. 119, 123 (where counsel exploited a serious discrepancy in the testimony of government witnesses and which the prosecutor quickly conceded in rebuttal), Tr. 120-122 (where counsel successfully attacked the Government's case for grand larceny), and Tr. 121 (where appellant's version is given a fleeting semblance of plausibility by casting suspicion on another).

argument to which objection is now addressed. Cf. *Jackson v. United States*, 123 U.S. App. D.C. 276, 359 F.2d 260, *cert. denied*, 385 U.S. 877 (1966).

In any event any conceivable confusion or adverse effect was dissipated by the trial court's careful instruction to the jury that the impeaching conviction bore only on credibility (Tr. 135-136). See *Cross v. United States*, *supra*.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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